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ONTARIO INTRODUCES DRAFT PENSION REFORM LEGISLATION

INTRODUCTION

Following on the heels of the Report of the Ontario Expert Commission on Pensions (“OECF”), the Ontario Government released draft pension reform legislation on December 9, 2009. Bill 236, *Pension Benefits Amendment Act, 2009* (“Bill 236”) marks the beginning of what the Government is calling a multi-stage pension reform process to modernize Ontario’s pension system.

The draft legislation covers an array of issues, virtually all of which were identified by the OECF as areas requiring reform. The second stage of the modernization process is slated to be introduced in 2010, and is anticipated to include changes applicable to the funding and investment of pension plans.

Bill 236 addresses corporate reorganizations and sale of business transactions through the elimination of partial wind ups, new asset transfer rules, and simplified surplus distribution rules on full plan wind ups.

Bill 236 also provides for enhanced member benefits in a number of respects, strengthens supervisory oversight, and expands member disclosure requirements.

This *FTR Now* reviews the highlights of Bill 236.

CORPORATE REORGANIZATIONS AND SALES OF BUSINESS: NEW RULES FOR WIND UPS AND ASSET TRANSFERS

ELIMINATING PARTIAL WIND UPS IN ONTARIO

Partial plan wind ups have been the source of significant litigation over the past two decades, yet the Financial Services Tribunal (“FST”) and court

decisions have only added to the uncertainty for employers undergoing a reorganization or downsizing. Currently, it is very difficult to predict the circumstances in which a partial wind up will be ordered. In that sense, the elimination of partial wind ups is a positive change for employers.

FUTURE PARTIAL WIND UPS

Future partial plan wind ups will be eliminated under Bill 236. If passed, Bill 236 will provide that no partial wind up can be declared by the employer, or the administrator in the case of a multi-employer pension plan or ordered by the Superintendent, if the effective date of the partial wind up would fall on or after the date on which the new partial wind up provision of the amended *Pension Benefits Act* (“PBA”) comes into force, currently planned to be January 1, 2012. The current PBA partial wind up triggers will cease to exist.

In particular, as proposed, future downsizings that result from corporate restructurings or discontinuing business at a particular location will no longer trigger a partial wind up. Similarly, a corporate transaction in which the employer sells assets relating to a part of its business will not result in a partial plan wind up, even if the purchaser fails to establish a successor pension plan for transferring employees.

EXISTING PARTIAL WIND UPS

A separate set of proposed transition rules will apply to partial wind ups that are in existence or under consideration at the time the amended PBA provisions on wind up come into force.

The key consideration will be the cut off “effective” date for any new partial wind ups. There are no doubt numerous situations currently being assessed by the Superintendent and by employers and administrators that may trigger a partial wind up under the current PBA. The transition rules deal with this reality by establishing a complete prohibition on partial wind ups that have an effective date that is on or after the date the new legislation comes into effect, currently planned to be January 1, 2012.

Likewise, the Bill 236 transition rules expressly allow for a partial plan wind up to occur with an effective date that is before the date the new legislation comes into effect. Therefore, partial plan wind ups that have recently been declared or ordered will not be cancelled. For situations presently under consideration, or in respect of which the effective date of the partial wind up is not yet known, the transition rules specifically allow that the effective date can be determined after the coming into force of the new legislation.

Partial wind ups that are currently in progress, or that are declared or ordered with an effective date that is before the date the amended PBA comes into force, will be governed by transition rules which closely resemble the existing status quo provisions on partial wind up.

The main difference between the two is that, under the transition rules, the administrator will not be required to purchase annuities to satisfy the pension benefit entitlements of members affected by the partial wind up who have chosen to leave their pension benefits in the plan. This changes the current policy of the Financial Services Commission of Ontario (“FSCO”), which requires all pension benefits remaining in the wound up portion of the pension plan to be annuitized. The new rule will be a welcome change for administrators and employers.

Vesting and grow-in rights will continue to apply to members affected by partial wind ups. As well, the existing regime that applies on a partial wind up relating to the distribution and sharing of any surplus attributable to the wound up portion of the plan will remain in effect.

NEW PRE-CONDITIONS FOR FULL WIND UPS

Bill 236 introduces a new wind up concept that may well attract some of the same interpretive difficulties that have plagued the old partial wind up provisions since their inception in the late 1980’s.

Specifically, with the elimination of the partial wind ups relating to future events and transactions, Bill 236 introduces a new concept applicable solely to full wind ups. The trigger for a full wind up will be circumstances in which “all or substantially all” of the employer’s business is discontinued or sold or in which “all or substantially all” of the members of the pension plan cease to be employed as a result of a reorganization of the employer’s business. The phrase “substantially all” as distinct from “all” suggests that something less than a complete shutdown or the termination of all plan members will be sufficient to warrant a full plan wind up. The term “substantially all” is not defined in the Bill.

If any one of the full wind up triggers is met, and a wind up is consequently declared or ordered, the plan will be wound up in its entirety and the assets of the plan distributed in accordance with the amended PBA. A key consideration will be the rights and entitlements of remaining employees in respect of their plan membership in circumstances where a corporate reorganization results in a full plan wind up because of the cessation of

employment of “substantially all” (but not “all”) of the members of the pension plan.

A related concern will be whether, in accordance with the interpretation of the FST and the Divisional Court in the *Hydro One* case, there might also be an order for a full wind up of the plan if “substantially all” of the members of one of the subgroups covered by the pension plan cease their employment under a reorganization.

SURPLUS SHARING ON FULL WIND UP

In a positive development for employers, the proposed amendments will simplify the process for an employer to obtain a refund of surplus on full wind up of a pension plan. Provided the employer establishes the existence of the surplus, provision has been made for the payment of all benefits and the employer and plan otherwise comply with the PBA requirements related to the payment of surplus, Bill 236 will permit the Superintendent to consent to the payment of surplus to an employer on the basis of a written agreement with members, former members, retired members and other persons entitled to payments on the date of the wind up without evidence that the pension plan provides for payment of the surplus to the employer on wind up.

In this case, an employer will no longer need to establish clear surplus ownership as a condition of obtaining a refund of surplus. This change will eliminate what was often a lengthy and expensive process of establishing surplus ownership and will curtail the need to bring court actions to correct any ambiguity in surplus ownership language.

As noted above, the proposed new surplus sharing regime will not apply to surplus distributions that are required under a partial plan wind up. The existing two-fold requirement of establishing employer ownership of surplus and the requisite consent of members and former members would continue to apply to a distribution of surplus on partial wind up of a pension plan.

ASSET TRANSFERS

DEFINED BENEFIT ASSET TRANSFERS ON SALE OF BUSINESS TRANSACTIONS

The transfer of pension assets in sales of business is generally beneficial to affected plan members since it allows their benefits to be kept “whole” by permitting future salary increases to apply to benefits earned in the vendor’s pension plan. Otherwise, affected plan members’ benefits remain “frozen” in their former employer’s pension plan with benefits determined based on

earnings up to the date of sale or divestment, generally without the benefit of including future earnings increases with the successor employer.

Following the Ontario Court of Appeal decision in *Aegon Canada Inc. and Transamerica Life Canada v. ING Canada Inc* (“*Transamerica*”), FSCO adopted a policy that imposes restrictive limits on the ability of plan sponsors to transfer assets of pension plans, effectively prohibiting the transfer of affected members’ defined benefits in the vendor’s pension plan to the purchaser’s defined benefit plan. FSCO has taken the position that the *Transamerica* decision puts in question the ability to transfer assets between pension plan trusts – something which had previously been broadly accepted and routinely permitted. Since the *Transamerica* decision, FSCO has even imposed strict conditions in respect of applications for mergers of pension plans operated by the same employer. The imposition of these conditions and circumstances have essentially made asset transfers between defined benefit pension plans impossible in most cases. As a result, plan members have been left with past service benefits in the original plan and new benefits in the successor plan, a circumstance that can diminish their aggregate annual pension income significantly.

If passed, Bill 236 will amend the PBA to facilitate the transfer of assets between defined benefit pension plans by removing many of the current impediments to group asset transfers on sales of business.

The key changes to the PBA and FSCO policy proposed by Bill 236 which clarify and simplify defined benefit asset transfers areas follows:

STATUTORY CRITERIA FOR SUPERINTENDENT CONSENT TO AN ASSET TRANSFER ON A SALE OF BUSINESS OR DIVESTMENT

Bill 236 sets out the following five criteria that must be satisfied for the Superintendent of Financial Services (the “Superintendent”) to consent to the asset transfer:

1. the original employer and the successor employer must have entered into an agreement to transfer the assets and the Superintendent must be given notice of the agreement;
2. if the agreement requires the consent of the transferred members, their consent must have been given for the transfer and the Superintendent must be given notice of their consent;
3. the administrators of the two pension plans must have agreed on the valuation of the assets to be transferred and the Superintendent must be given notice of their agreement;

4. if the benefits to be provided under the successor plan for transferred members are not the same as those provided under the original plan, the commuted value of the benefits cannot be less than the commuted value of the benefits under the original plan; and
5. if the original plan has a surplus as of the effective date of transfer, a proportion of that surplus must be included in the assets transferred. The calculation of the proportion of surplus must be in accordance with regulations that have yet to be released.

TRANSFERS OF IDENTICAL BENEFITS V. BENEFITS OF EQUIVALENT VALUE

FSCO has taken the position that, under the PBA, plan members whose benefits are being transferred into another defined benefit plan on a sale of business or divestment must be offered past service benefits identical in every respect to those provided in the original plan. Identical benefits are difficult for the successor plan to administer since a plan amendment is required and the benefits are different from those offered under the main plan formula. Bill 236 proposes to rectify this troublesome position by amending the PBA to clarify that the successor plan is not required to provide the same pension benefits for the transferred members that were provided under the original pension plan, as long as the commuted value of the benefits provided under the successor plan is not less than the commuted value provided for them under the original plan.

PRIOR MEMBER CONSENT TO ASSET TRANSFER ON SALE OF BUSINESS OR DIVESTMENT

Bill 236 proposes to amend the PBA to provide the vendor and purchaser, as administrators of their plans, with the ability to agree to require the prior consent of affected plan members to transfer their pension benefits from the original plan to the successor plan. Adding the requirement for prior member consent in an asset transfer agreement between the parties would be desirable for the vendor, in particular, since Bill 236 also provides that if an asset transfer is made with the consent of a member, the administrator of the original plan (in most transactions, being the vendor or an affiliate of the vendor) is discharged on transferring the assets in accordance with the PBA.

PROPORTIONATE SHARE OF SURPLUS ON TRANSFER OF ASSETS

On an asset transfer, the PBA currently does not clearly require that a proportionate share of assets to liabilities (which would include a proportionate share of surplus) must be transferred from the original pension plan to the successor plan. Current FSCO Policy Statement No. 2 provides

that where a proportionate share of surplus is not transferred on an asset transfer, the transferred members retain a right to share in the surplus in the original plan should that plan wind up in future. However, in a 2008 decision of the Ontario Court of Appeal in *Burke v. Governor and Co. of Adventurers of England Trading into Hudson's Bay* ("Burke"), the Court found that the issue relating to whether a transfer of surplus is required on an asset transfer could be resolved by determining whether the transferred employees had any entitlement to the surplus based on the original plan documents at the time of the sale. Bill 236 overrides the *Burke* decision by amending the PBA to clearly require that the value of assets transferred include a prescribed portion of surplus.

WINDOW TO TRANSFER PENSION ASSETS IN RESPECT OF PAST SALES AND DIVESTMENTS

To assist members and employers negatively affected by past restructurings and divestments, Bill 236 opens a window to July 1, 2013 within which pension plans affected by such transactions may enter into agreements that would allow current individual plan members to elect to consolidate their pension benefits in the successor pension plan by way of an asset transfer. The asset transfer can be effected without the consent of the Superintendent provided the transfer agreement is filed with the Superintendent and certain statutory and prescribed requirements are met.

SUMMARY OF NEW ASSET TRANSFER RULES

Other than the requirement to transfer a proportionate share of surplus, overall, the proposed amendments to the PBA dealing with asset transfers between plans are good news for plan sponsors. Notably, Bill 236 proposes to override the impediments created by the *Transamerica* decision and resulting FSCO regulatory policy by setting out relatively clear criteria required to be satisfied in order to obtain the Superintendent's consent. Parties to sale of business transactions and divestments must negotiate the terms of the transfer subject to the condition that the commuted value of the benefits transferred into the successor plan shall be no less than the commuted value of those benefits in the original plan. These provisions of Bill 236 are also good news for plan members who may be involved in corporate transactions because they facilitate the consolidation of affected members' pension benefits in their new employer's plan and also propose to provide a temporary remedy (available until July 1, 2013) for those members whose pension benefits were negatively affected by past corporate divestments and restructurings.

The new asset transfer rules will impose additional communication challenges for the administrator of the original plan if the parties agree that prior member consent to the transfer will be required. The administrator would have to provide affected members with adequate information on which to base their decision to consent to the transfer. Such communications would presumably include personal statements and detailed explanations of the implications of the transfer.

Bill 236 still leaves some important requirements for asset transfers to be determined in the regulations, such as funding conditions that must be satisfied, especially in circumstances where either pension plan has going concern or solvency deficiencies as of the effective date of the transfer.

ENHANCED INDIVIDUAL MEMBER RIGHTS

Bill 236 contains a number of proposed amendments aimed at enhancing the entitlements of members of individual pension plans. The most surprising of these enhancements is the very significant expansion of grow-in rights. Other proposed enhancements include immediate vesting and phased retirement provisions.

IMMEDIATE VESTING

Following the lead of the Province of Quebec and the announced intention of the Federal Government, Bill 236, if passed, would provide for immediate vesting of pension entitlements. This proposal is also consistent with the recommendation made by the OECF.

SMALL BENEFIT COMMUTATIONS

Given that the immediate vesting provision will apply to all pension plan members, even short-service members will have pension entitlements. In order to ease the burden on pension plan administrators associated with managing a greater number of small pension amounts, Bill 236 proposes an increase to the threshold applicable to small benefit commutations. Currently, a pension plan may commute the pension benefits of a former member if the annual pension payable at normal retirement date is 2 percent (or less) of the Year's Maximum Pensionable Earnings in the year of termination of membership ("YMPE"). Bill 236 proposes to allow pension plans to be amended to commute pension entitlements if the annual pension payable at normal retirement date is up to 4 percent of the YMPE or if the commuted value of the pension is less than 20 percent of the YMPE.

The small benefit rule will be extended to apply to survivor pensions. In this case, the limit will be based on the YMPE in the year of the member's death.

GROW-IN BENEFITS

Grow-in benefits provide an enhanced pension benefit to members whose age and continuous service totals 55 or more points. Ontario and Nova Scotia are the only two Canadian jurisdictions to mandate grow-in benefits. In general terms, the grow-in provisions entitle defined benefit pension plan members who have at least 55 age and service points to the value of early retirement subsidies and bridge benefits based on the credited service they have earned to the date of their termination of plan membership. Currently, grow-in benefits only apply in the event of a full or partial wind up of a pension plan. For many employees, the value of grow-in benefits may exceed the value of notice and severance pay entitlements, particularly for those participating in pension plans with generous early retirement subsidies and bridge benefits.

Consistent with the OECF recommendations on grow-in benefits, Bill 236 proposes to extend grow-in benefits to all members of single employer sponsored plans whose employment is involuntarily terminated commencing on January 1, 2012. Notably, the Bill 236 requirement that pension plans provide grow-in benefits for all involuntary terminations of employment does not extend to members of jointly-sponsored pension plans or multi-employer pension plans. In the case of those plans, an election can be made to opt out of providing grow-in benefits.

Under Bill 236, grow-in benefits are proposed to continue to apply in the case of full pension plan wind ups and partial wind ups during the transition period described above. The "activating event" that triggers grow-in benefits would include either the full wind up of a pension plan or the employer's termination of a member's employment on or after January 1, 2012. Resignations will not trigger grow-in benefits under Bill 236. However, the pension law implications of a resignation versus a not for cause termination are significant and may affect how employers manage near cause terminations. Terminations of employment resulting from willful misconduct, disobedience or willful neglect of duty by the member that is not trivial and has not been condoned by the employer are excluded from the application of grow-in benefits. This standard is similar to the "just cause" standard applied under the *Employment Standards Act, 2000* in respect of terminations which do not require the provision of severance pay or advance notice or pay in lieu thereof. Bill 236 allows for other terminations of employment to be excluded by regulation. To the extent that employment terminations such as those

arising from frustration of contract or from a refusal to accept reasonable alternative employment are not ultimately excluded, terminated employees could be disentitled from receiving statutory notice or severance pay but yet be entitled to grow-in benefits under their pension plans.

If these provisions of Bill 236 become law, the issue of entitlement to grow-in benefits will need to be addressed in all terminations of employment for both unionized and non-unionized employees. There is a real potential for civil courts, arbitrators, the Ministry of Labour, and the Superintendent each to develop a different view of the “just cause” threshold or to have overlapping jurisdiction to address this issue in the case of a particular termination of employment. Presently, it is not permissible to contract out of entitlements under the PBA and an issue for consideration is whether the workplace parties themselves will be able to independently arrive at a binding settlement that represents a compromise on the value of grow-in benefits that may be payable from a pension plan.

As mentioned above, the extension of grow-in benefits to most involuntary termination circumstances is proposed to have application commencing on January 1, 2012. This timing provides Ontario-based employers with an opportunity to amend (or in the case of negotiated plans, to negotiate amendments to) the early retirement and bridge benefit provisions of their pension plans. Since they are “ancillary benefits”, it remains permissible under the PBA to reduce or eliminate them for those members who have not met all qualifications to receive the benefits. However, other employment law considerations may affect employers’ ability to make such changes unilaterally..

PHASED RETIREMENT

Bill 236 would also amend the PBA to permit phased retirement pensions for Ontario members of defined benefit pension plans. This follows through on a commitment made in the 2009 Ontario Budget.

Until recently, federal income tax regulations had the effect of preventing credit for additional service under a pension plan once an employee commenced receipt of a pension from that plan. Amendments to the *Income Tax Act* (Canada) (“ITA”) changed this rule so that an employee who qualifies could receive a partial pension while continuing to accrue credited service under the pension plan. Notwithstanding these changes, complementary amendments were required under the PBA to extend phased retirement to Ontario plan members.

Bill 236 does not make phased retirement a mandatory plan provision. Rather, it proposes to permit plans to be amended to offer phased retirement. It is likely that an employer that decides to amend its plan to permit phased retirement would be required to make it available to classes of employees, and would not be permitted to make phased retirement available to select individuals.

Moreover, Bill 236 proposes to extend phased retirement only to Ontario members who satisfy all of the following conditions:

- the member must be at least 60 years of age or at least 55 years of age and entitled to an unreduced pension;
- the member has not yet reached the plan's normal retirement date; and
- the member and the member's employer have entered into a written agreement providing for a reduction in the member's regular hours of work and containing terms respecting phased retirement payments.

Bill 236 also proposes that phased retirement payments cannot exceed 60 percent of the pension payments to which an eligible member would be entitled as a retired member. Certain other rules governing phased retirement pensions may be prescribed by future regulations that have yet to be released.

These changes would bring Ontario into line with other Canadian jurisdictions that have already introduced phased retirement. It is not clear whether Bill 236 is also intended to permit phased retirement for defined contribution plan members.

SUPERVISORY OVERSIGHT AND IMPROVED PLAN ADMINISTRATION

Bill 236 proposes to tweak several provisions of the PBA in an effort to simplify plan administration and reduce administration costs. It also provides the Superintendent with expanded oversight powers.

IMPROVED PLAN ADMINISTRATION

The ability to transfer, on a non-locked in basis, certain cash payments from the pension fund to an RRSP or RRIF will be specified in the PBA if Bill 236 becomes law. The types of payments affected include small benefits, excess contributions (as a result of the application of the 50 percent rule), refunds of required contributions with interest, and pre-retirement death benefits. Many plan administrators already permit a recipient to direct payment to his or her

personal registered savings vehicle, but with this change, all plans will be required to offer it as an option.

Bill 236 also proposes to relax the timing for an application for the refund of employer contributions made in error, or for reimbursements to the employer of amounts that should have been paid out of the fund. Applications to the Superintendent will no longer have to be made in the same fiscal year as the over-contribution or payment. This deadline was cumbersome since such errors are often not discovered until after the fiscal year in which they occurred. Bill 236 proposes that employers can apply for refunds within 24 months after the date the contribution or payment were made, or, if later, six months after the date the administrator becomes aware of the mistake.

ENHANCED POWERS FOR SUPERINTENDENT

Bill 236 gives the Superintendent the power, in prescribed circumstances, to order a plan administrator to have an actuarial valuation or other report prepared, even if no valuation is due under the normal timeframes set out in the PBA. This was recommended by the OECP.

The Bill requires that the Superintendent must have reasonable and probable grounds to believe that there is a substantial risk to benefit security, or that there has been a “significant change in the circumstances of the pension plan”. The Superintendent might attempt to use this power when there is reason to believe that the plan assets have been seriously eroded due, for example, to poor investment performance and a series of benefit improvements, and the employer is continuing a contribution holiday based on the results of the last triennial valuation. A new valuation would then trigger a new contribution requirement and perhaps prevent further decline in the plan’s funded status and may be designed to measure the financial health of a pension plan in the case of a sale or other event, which now does not trigger a partial wind up.

Among other things, the order may specify the assumptions or methods to be used in the report and require the administrator or employer to pay the cost of the report.

The order will take immediate effect and will not be subject to the usual FST hearing appeal procedures. Rather, the order must be appealed to the FST within 15 days after it is received. A stay of the order is not automatic and must be requested from the FST (or from the court, if judicial review of the order of the FST is subsequently sought).

As recommended by the OECF, Bill 236 gives the Superintendent the power to approve an agreement by the parties to a *Companies' Creditors Arrangement Act* ("CCAA") compromise or arrangement or *Bankruptcy and Insolvency Act* ("BIA") proposal that results in less than the required amounts being paid to the pension fund.

As a result of recent amendments to the CCAA and BIA, a court cannot approve an arrangement or proposal if the arrangement or proposal does not provide for the payment to the pension fund of normal cost contributions and deducted but unremitted member contributions. These provisions give those payments a "super" priority ahead of other creditors of the employer. However, under the BIA and CCAA amendments, the court can approve an arrangement which results in the insolvent company remitting something less than these amounts if the pension regulator has approved the agreement.

Bill 236 proposes to grant the Superintendent the power to approve such an agreement. The agreement must satisfy certain conditions before the Superintendent can approve it. These conditions will be prescribed in regulations which have yet to be released.

Once the Superintendent decides to approve or not approve the agreement, the decision is final, and the PBA does not provide for any appeal from that decision. Although under administrative law rules there may continue to be grounds to seek a judicial review of the Superintendent's decision by a court, the circumstances under which this will be possible will be very limited. The finality of the Superintendent's decision will facilitate an arrangement by minimizing the opportunities for a plan beneficiary who is opposed to the arrangement to prevent or delay the implementation of a compromise by disputing the Superintendent's decision to approve it.

TRANSPARENCY AND ACCESS TO INFORMATION FOR PLAN MEMBERS AND PENSIONERS

Bill 236 proposes a number of new measures aimed at increasing transparency and access to information for plan members and pensioners. Increased transparency and access to information were the subject of some of the recommendations made in the OECF report. While not fully adopting the OECF's recommendations, the proposed amended legislation will enact the following key measures.

DISTINGUISH BETWEEN “RETIRED MEMBERS” AND “FORMER MEMBERS”

Bill 236 defines “retired members” as those former members in receipt of a pension or entitled to receive an immediate pension. The amended PBA will distinguish retired members from “former members”, who will be defined as members who have terminated membership in a pension plan but who have neither begun to receive nor are entitled to receive an immediate pension. Currently, the PBA’s definition of “former member” encompasses both retired and other terminated members without distinguishing between the two.

Retired and former members will be entitled to receive specified information about their pension plan that will be set out in future regulations. As well, the proposed legislation will allow retired members to participate in a pension committee or board of trustees acting as the administrator of a pension plan.

The proposed changes adopt recommendations of the OECP report aimed at encouraging the participation of retired members in pension plan governance.

FACILITATE ESTABLISHING PENSION ADVISORY COMMITTEES

The PBA currently allows members and former members (as that term is currently defined) to establish a pension advisory committee (“PAC”) by majority vote between them. The purpose of a PAC is to monitor a pension plan’s administration, to make recommendations to a plan administrator and to increase all members’ understanding of their plan. Practically, few plans have PACs, and the OECP found that those PACs that do exist are often ineffective because they lack access to relevant plan information.

The amended legislation will make it easier for members to establish PACs. A trade union will be able to consent to the establishment of a PAC on behalf of active members whom it represents. The amendments will entitle each class of employee represented in a pension plan to appoint at least one representative to the PAC. Retired members will be entitled to appoint at least two members. Former members (as that term will be newly defined) will also be able to participate in PACs, but such participation will not be mandatory. As well, proposed rules will require plan administrators to facilitate both the creation and ongoing activities of a PAC by providing the PAC with any relevant information under its control and certain other assistance that will be set out in future regulations.

The proposed amendments partly adopt the OECP’s recommendation that every plan, subject to limited exceptions, be required to establish a PAC of at least five members and comprising both active and retired members. While

the amendments do not go so far as to require each plan to have a PAC, they do give substantial participation power to unions and retired members should a PAC be established.

PROVIDE ADVANCE NOTICE OF PLAN AMENDMENTS

Bill 236 proposes to require pension plan administrators to provide members, retired members, former members, and trade unions with notice of all plan amendments before they are registered with the regulator, subject to exceptions that will be set out in future regulations. Currently, administrators need only provide affected members with notice of “adverse” amendments, which are defined as amendments that reduce future pension accruals or otherwise adversely affect rights of members or others entitled to payment from the plan. Administrators may currently provide notice of other, non-adverse amendments in the annual statement provided to members. It is unclear what kinds of amendment the future regulations will exempt from the proposed requirement to give advance notice, and, more particularly, whether these exemptions will at least include compliance or “housekeeping” amendments.

PROVIDE ENHANCED PLAN INFORMATION AND ACCESS TO DOCUMENTS

Bill 236 contains a new provision allowing plan administrators to provide all members with notices, statements, and other records electronically, subject to exceptions that will be outlined in future regulations. Members will have to consent to receive such notices electronically. The provision of electronic documents will be governed by Ontario’s *Electronic Commerce Act, 2000*.

As well, the proposed amended legislation will modify existing provisions allowing the inspection of pension plan documents and records. The PBA currently requires plan administrators and the Superintendent to make prescribed pension plan documentation available for inspection by plan members, trade unions, participating employers, and certain other parties on request. The proposed amended legislation will expand these parties’ access to pension plan information by requiring plan administrators and the Superintendent to provide copies of specified documents, electronically or by mail, on written request. Fees charged by plan administrators for this service will be subject to prescribed maximums.

Finally, Bill 236 introduces a novel exception to the right of members’ and other parties’ to inspect plan documents. A new provision will bar inspection of a plan record if the Superintendent takes the position that disclosure of the

record could reasonably be expected to prejudice the economic interest or competitiveness of an employer.

Bill 236 partially adopts the OECP's recommendation that members have electronic access to plan documentation since many of them are unable to attend at the premises of an employer or the Superintendent. On the other hand, the OECP also recommended that plan administrators translate or summarize all documentation into "plain" English or the dominant language of the workplace. Bill 236 does not go this far.

REQUIRE RETENTION OF RECORDS

Bill 236 requires plan administrators to retain prescribed pension records for prescribed periods of time. Future regulations will set out the parameters of this requirement.

CONCLUSION AND NEXT STEPS FOR EMPLOYERS

Bill 236 passed first reading in the Ontario Legislature on December 9, 2009. It is not known when the Bill will become law and it is possible that revisions may be made to the draft legislation. Therefore, the amended PBA may ultimately differ from Bill 236. Nevertheless, the Bill gives employers a very good indication of the general thrust of the new legislation, which will generally come into effect upon a day to be named by proclamation of the Lieutenant Governor.

Certain specific provisions will come into effect on specific dates set out in Bill 236. These include grow-in rights (January 1, 2012), and the closing of transfer window for asset transfers relating to past divestitures (January 1, 2013).

It is important that employers immediately begin to assess the implications of any ongoing or contemplated corporate initiative or transaction affecting pension plan members, in particular, in order to be in a position to respond to the changes. Employers will also want to track the passage of the Bill and to review and understand the regulations when they are released. Our Pension & Benefits Group will keep you apprised of these developments over the months ahead.

If you have any questions about this *FTR Now*, or about how Bill 236 may affect your business and your pension plan, please contact any member of the Pension & Benefits Group.

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